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(Table, Text in WESTLAW), Unpublished Disposition

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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
Steven A. GILKEY, Appellant,
v.
KANSAS PAROLE BOARD, Appellee.
No. 96,624.

Dec. 22, 2006.
Review Denied March 28, 2007.

Appeal from Reno District Court; Timothy J. Chambers, judge. Opinion filed December 22, 2006. Affirmed.
Steven A. Gilkey, appellant pro se.

Robert G. Allison-Gallimore, assistant attorney general, and Phill Kline, attorney general, for appellee.

Before MALONE, P.J., GREEN and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Steven Gilkey appeals from the trial court's dismissal of his K.S.A. 60-1501 petition for failure to state a claim upon which relief can be granted. Gilkey argues that the trial court erred in dismissing his petition without hearing the merits of the case. Finding no reversible error, we affirm.

Gilkey's parole was revoked following a revocation hearing in April 2004 for four violations of the terms of his parole. Gilkey was provided with a final action notice that notified him of the decision to

revoke his parole and set forth the four violations supporting the revocation. At a hearing in March 2005, the Kansas Parole Board (KPB) continued the consideration of Gilkey's parole for measurement of Gilkey's risk to reoffend and for an assessment for substance abuse and mental health treatment. Another hearing was conducted in May 2005, and the KPB continued the consideration of Gilkey's parole for "LSI-R and screening for Therapeutic Community and/or CDRP."

After a hearing in June 2005, the KPB passed Gilkey for parole until April 2006. The following reasons were given: history of criminal activities; 10 incarcerations in prison; failure on parole; and objections to parole. The KPB recommended that Gilkey enter and successfully complete "therapeutic community." Gilkey's next hearing occurred in March 2006. The KPB passed Gilkey for parole until April 2009, finding that it was not reasonable to expect that parole would be granted at a hearing held before that date. The KPB listed the following pass reasons: serious nature and circumstances of crimes; history of criminal activities; 10 times in prison; failure on parole; and disciplinary reports. In addition, the KPB listed the following extended pass reasons: Gilkey had not cooperated on a long term plan to resolve his physical needs and to resolve his substance abuse.

In April 2006, Gilkey petitioned for relief under K.S.A. 60-1501. Gilkey contended that the KPB had denied his right to equal protection, his right to due process, and his rights under the Americans with Disabilities Act (ADA). In a written order, the trial court dismissed Gilkey's petition for failure to state a claim upon which relief can be granted. Moreover, the trial court determined that the KPB complied with the applicable statutes and the KPB's actions were not arbitrary or capricious.

On appeal, Gilkey contends that the trial court erred in dismissing his K.S.A. 60-1501 petition without hearing the merits of his case. Proceedings on a

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K.S.A. 60-1501 petition are not subject to the ordinary rules of civil procedure. To avoid summary dismissal, a K.S.A. 60-1501 petition must allege shocking and intolerable conduct or continuing mistreatment of a constitutional stature. *Bankes v. Simmons*, 265 Kan. 341, 349, 963 P.2d 412, cert. denied 525 U.S. 1060 (1998).

When reviewing a district court's order dismissing a K.S.A. 60-1501 petition for failure to state a claim upon which relief can be granted, an appellate court must accept the facts alleged by the plaintiff as true. The court must determine whether the alleged facts and all the inferences arising therefrom state a claim, not only on the theories set forth by the plaintiff, but on any possible theory. *Hill v. Simmons*, 33 Kan.App.2d 318, 320, 101 P.3d 1286 (2004).

Untimely Allegations

*2 As the KPB points out, the trial court interpreted Gilkey's K.S.A. 60-1501 petition as "objecting to the petitioner's denial of parole and deferral of parole consideration to April 2009." These decisions by the KPB were contained in an action notice dated March 27, 2006. Nevertheless, it appears that in his K.S.A. 60-1501 petition and also in his appellate brief, some of Gilkey's arguments relate to the KPB's decision to revoke his parole and to the KPB's other actions occurring before March 2006. The State correctly points out that such challenges are untimely under K.S.A. 60-1501(b). K.S.A. 60-1501(b) requires that a petition must be filed within 30 days from the date of the final action, unless the inmate is attempting to exhaust administrative remedies. The final action notice in which the KPB revoked Gilkey's parole was issued in May 2004. Other decisions by the KPB were contained in action notices from March 2005, May 2005, and June 2005. In March 2006, the KPB issued its decision to pass Gilkey for parole until April 2009. Gilkey filed his K.S.A. 60-1501 petition in April 2006. Gilkey's K.S.A. 60-1501 petition was timely only as to the KPB's March 2006 decision.

March 2006 Decision to Deny Parole

Gilkey challenges the KPB's March 2006 decision to deny him parole. Gilkey's arguments center on Americans with Disabilities Act (ADA) grounds, equal protection grounds, and due process grounds. Each of these grounds will be discussed separately.

Americans with Disabilities Act Grounds

Gilkey contends that he, as a disabled individual, was discriminated against in violation of the ADA when the KPB failed to grant him parole. Title II of the ADA, which prohibits public entities from discriminating against a "qualified individual with a disability" on account of such disability, applies to inmates in state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208, 141 L.Ed.2d 215, 118 S.Ct. 1952 (1998); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1025 (9th Cir.1997) (holding that ADA applies to inmates and parolees in state correctional system). Although it is unclear from Gilkey's K.S.A. 60-1501 petition and appellate brief the extent of his disability, the record indicates that Gilkey suffers from degenerative disc disease; arthritic changes and spurring of the back; pain; and a history of treatment for substance abuse.

In arguing that the ADA was violated in this case, Gilkey cites *Thompson v. Davis*, 295 F.3d 890, 898 (9th Cir.2002), cert. denied 538 U.S. 921 (2003), where the Ninth Circuit Court of Appeals held that under the ADA, a "parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities." Thus, in order to come within the rule in *Thompson*, Gilkey needed to show that the KPB categorically excluded a class of disabled people from consideration for parole because of their disabilities. Nevertheless, in arguing that the ADA was violated in this case, Gilkey states that the KPB, while denying him parole, granted parole to other prisoners with disabilities. Gilkey's argument runs counter to the rule in *Thompson*.

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*3 In his brief, Gilkey focuses on the fact that he completed some of the KPB's recommendations, such as the mental health testing and the "LSI-R" test, but was still denied parole. Nevertheless, Gilkey was never told in the action notices that he would be granted parole if he completed the KPB's recommendations. The action notices clearly stated: "IF YOU ARE PASSED TO A LATER DATE: The PAROLE BOARD will consider your case further during the month designated. A good institutional record and a sound parole plan are essential requirements for release on parole." A "Program Classification Review" document in the record shows that Gilkey was aware of and struggling with the fact that he was not guaranteed parole upon satisfactory completion of the KPB's recommendations. Moreover, this document indicates that Gilkey had not been completely cooperative, as he told the person doing the review that he might refuse to comply with the KPB's recommendations and just serve his sentence to 2013.

The pass reasons provided by the KPB in the March 2006 action notice are consistent with the factors under K.S.A.2005 Supp. 22-3717. K.S.A.2005 Supp. 22-3717(h)(2) requires the KPB to consider all pertinent information regarding the inmate, including but not limited to the factors specifically listed under that provision. The circumstances of the offense; the presentence report; the prior social history and criminal record of the inmate; and the conduct and attitude of the inmate in prison are all listed as factors under K.S.A.2005 Supp. 22-3717(h)(2). The documents submitted by Gilkey to support his K.S.A. 60-1501 petition indicate that the KPB's findings were based on an individualized assessment of Gilkey that is required under K.S.A.2005 Supp. 22-3717(h)(2).

Equal Protection Grounds

Next, Gilkey argues that his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution have been violated because the KPB denied him parole but did not

deny parole to other indistinguishable and similarly situated individuals. "The concept of equal protection of the law is one which 'emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.' [Citation omitted.]" *State v. Mueller*, 271 Kan. 897, 903, 27 P.3d 884 (2001), *cert. denied* 535 U.S. 1001 (2002). Gilkey seems to contend that all individuals convicted of crimes are indistinguishable for equal protection purposes because they become "slaves" to the government.

In responding to Gilkey's equal protection argument, the KPB cites *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir.1994), where the Tenth Circuit Court of Appeals, in addressing the argument that an inmate was not treated the same as similarly situated individuals when he was moved to administrative segregation, stated that "it is 'clearly baseless' to claim that there are other inmates who are similar in every relevant respect. [Citation omitted.]" The court recognized that inmates might be classified differently due to slight differences in their histories and also because some present a higher risk of future misconduct than others. The court concluded that the plaintiff's claim that there were no relevant differences between him and other inmates that might account for their disparate treatment was not plausible or arguable. 16 F.3d at 371.

*4 The KPB also cites *Houtz v. Deland*, 718 F.Supp. 1497, 1501-02 (D.Utah 1989), where the court stated as follows:

"Each inmate brings a different set of circumstances, including his history, his crimes, and his rehabilitative progress while in prison, to the parole hearing. Parole decisions, by their very nature, require the Board of Pardons to look at the individual circumstances of the prisoner and his crimes. Only in this way can the Board decide if the prisoner before it is ready to reenter society."

As the KPB asserts, because Gilkey was not situated similarly as other inmates nor was he arguably

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indistinguishable from other inmates for purposes of parole, he has failed to present a situation in which the Equal Protection Clause would be implicated.

Due Process Grounds

Finally, Gilkey contends that he was denied his due process rights. "In order to establish a cognizable claim for a due process violation, the petitioner must establish a valid liberty or property interest in his or her incarceration status which has been infringed by the State without due process of law." *Laubach v. Roberts*, 32 Kan.App.2d 863, Syl. ¶ 8, 90 P.3d 961 (2004). Holding that a previous version of K.S.A.2005 Supp. 22-3717 did not create a liberty interest in parole, our Supreme Court in *Gilmore v. Kansas Parole Board*, 243 Kan. 173, 180, 756 P.2d 410, cert. denied 488 U.S. 930 (1988), stated as follows:

"Upon consideration of the entire statutory scheme in Kansas, we conclude that the various factors which the Board is directed to consider are procedural guidelines and not a limitation upon the Board's discretion. The Board is empowered to grant parole, but only in the exercise of its discretion, after considering the facts of the offense and the background, record, history, and situation of each prisoner. While the Board's action in revoking parole involves a liberty interest, *Johnson v. Stucker*, 203 Kan. 253, 259, 453 P.2d 35, cert. denied 396 U.S. 904 (1969), and *Morrissey v. Brewer*, 408 U.S. 471, 481, 482, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972), the Kansas parole statute does not give rise to a liberty interest when the matter before the Board is the *granting* or *denial* of parole to one in custody. Parole, like probation, is a matter of grace in this state. It is granted as a privilege and not as a matter of fundamental right. *State v. DeCourcy*, 224 Kan. 278, Syl. ¶ 3, 580 P.2d 86 (1978). We hold that K.S.A.1987 Supp. 22-3717 does not create a liberty interest in parole."

Although some of the provisions under K.S.A.2005 Supp. 22-3717 have changed from those under K.S.A.1987 Supp. 22-3717, K.S.A.2005 Supp. 22-3717(g) and (h) still gives the KPB discretion to grant or deny parole. K.S.A.2005 Supp. 22-3717 sets certain timelines when an inmate is *eligible* for parole. Nevertheless, K.S.A.2005 Supp. 22-3717 does not establish an inmate's right to the grant of parole.

Although inmates do not have a liberty interest in parole, the decision of the KPB can be reviewed in a K.S.A. 60-1501 petition as to whether the KPB complied with the applicable statutes and whether the decision was arbitrary and capricious. A habeas corpus action is the appropriate procedure to review a decision by the KPB. Nevertheless, parole is a privilege and a matter of grace, and the trial court's review of the KPB's denial of parole is limited to whether it complied with applicable statutes and whether its action was arbitrary and capricious. *Torrence v. Kansas Parole Board*, 21 Kan.App.2d 457, 458, 904 P.2d 581 (1995).

*5 In his brief, Gilkey does not allege that the KPB failed to comply with any of the statutory provisions concerning the grant or denial of parole. Instead, Gilkey cites to three administrative regulations, K.A.R. 45-500-2(g), K.A.R. 44-15-101, and K.A.R. 44-16-104. It is unclear why Gilkey cites to these regulations. K.A.R. 45-500-2(g) requires that when an offender's release is revoked, the KPB must give the offender "a written statement as to the evidence relied upon and reasons for revoking the release." As discussed above, the KPB's decision revoking Gilkey's parole is not at issue here. Moreover, even if it were at issue, the record establishes that the KPB did comply with K.A.R. 45-500-2(g). K.A.R. 44-15-101 relates to the grievance procedure for inmates or parolees. K.A.R. 44-16-104 was revoked in 2002. None of these regulations apply to the KPB's March 2006 decision.

Here, the trial court found that the KPB complied with the applicable statutes and that the actions of the KPB were not arbitrary or capricious. An appel-

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late court reviews a trial court's decision on a K.S.A. 60-1501 petition to determine whether the trial court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the court's conclusions of law. *Rice v. State*, 278 Kan. 309, 320, 95 P.3d 994 (2004). In its March 2006 action notice, the KPB specifically listed the factors on which it was relying to not grant Gilkey parole at that time. These factors were consistent with the information to be considered under K.S.A.2005 Supp. 22-3717(h)(2). There is no indication that the trial court's decision was arbitrary or capricious.

Affirmed.

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Only the Westlaw citation is currently available.

United States District Court,
 D. Kansas.
 Dale E. McCORMICK, Petitioner,
 v.
 Steven SIX, Attorney General of Kansas, Respondent.
 No. 08-3058-SAC.
 May 30, 2008.

Dale E. McCormick, Lansing, KS, pro se.

Jared S. Maag, Kansas Attorney General, Topeka, KS, for Respondent.

ORDER

SAM A. CROW, Senior District Judge.

*1 This matter is before the court upon respondent's Motion to Dismiss for Failure to Exhaust Available State Court Remedies (Doc. 16), petitioner's Motion to Alter or Amend Judgment (Doc. 24), and petitioner's Motion to Expedite Proceedings (Doc. 29).

MOTION TO ALTER OR AMEND JUDGMENT

Petitioner has filed a Motion to Alter or Amend Judgment (Doc. 24) challenging the court's Order entered March 12, 2008. As grounds for this motion, he argues that this court's denial of his motion for bail (Doc. 6) was not decided under an appropriate standard, and that the court incorrectly found he was not challenging his "so-called 'drug-related' convictions" in this case.

As to the latter objection, the court finds petitioner has not presented in either of the two habeas petitions submitted herein any claim, or even any facts

or arguments that could be construed as a claim, regarding his drug convictions or the evidence stipulated to in his separate court trial on drug charges. Petitioner's statements in his "original action"^{FN1} cited in his federal Petition for "the reasons" the search warrant was illegal, are not sufficient to be either "incorporated" or construed as claims herein on his drug convictions. Even if this court considered petitioner's statements in his original action as allegations in his federal Petition, those Fourth Amendment claims do not include any allegations that drug evidence was improperly seized or admitted. In his original action petitioner listed the evidence he claimed was illegally admitted and prejudicial. All was admitted in his kidnapping trial; and he did not list marijuana plants, growing equipment, or drug paraphernalia. *Id.* at 34-40. While the court must liberally construe a pro se pleading, it may not add claims that simply are not presented.

FN1. Petitioner's 101-page action filed directly in the Kansas Supreme Court (Kan.App. Case No. 99643) seeking habeas corpus relief under Kan.S.Ct.Rule 9.01(a), *Exhibits in Support of Petition* (Doc. 9), Vol. 1, Appendix B, is hereinafter often referred to as his "original action" and cited as "Appendix B."

Furthermore, even if petitioner's claims in his federal Petition could be read to include challenges to his drug convictions, his own statement shows these challenges have not been exhausted in the state appellate courts and may even have been procedurally defaulted. In his "original action" to the Kansas Supreme Court, petitioner stated:

During the execution of the search warrant, officers (discovered) a small, personal marijuana-growing operation in the basement of petitioner's home. This resulted in petitioner being charged with four cultivation-related charges. The drug charges were tried at a severed trial, on stipulated facts (citations omitted).

Appendix B, at 27-28. He added in a footnote that his appellate counsel "failed to mention these drug charges or convictions in her brief to the KCOA" or the Petition for Review. The court concludes petitioner's challenges to his drug convictions are not presented in his federal Petition, and therefore denies his motion to alter or amend on this ground.^{FN2}

FN2. This is another dilemma caused by petitioner's attempt to proceed in federal court prior to properly and fully exhausting state court remedies on all his potential claims. His Fourth Amendment exhausted and unexhausted claims are obviously intertwined. He has presented challenges to evidence seized at his residence and introduced at his kidnaping trial, and exhausted state court remedies on these particular Fourth Amendment challenges. However, he has not exhausted his Fourth Amendment claims as to drug evidence. Respondent submits that the issues concerning petitioner's drug convictions are "subsumed" within his other Fourth Amendment claims, but not reviewable under *Stone v. Powell*. Petitioner, at his separate court trial, did expressly "preserve" for appeal his Fourth Amendment objections to the search and the drug evidence. Nevertheless, if his appellate counsel declined or failed to raise these objections on appeal, they are at least unexhausted and may even be procedurally defaulted. Petitioner's ineffective assistance of appellate counsel claim, which might include counsel's failure to challenge his drug convictions as a ground, is another clearly unexhausted claim.

Petitioner's attack on this court's judgment denying his Motion for Release on Bail or for expedited treatment of his Petition is not supported by adequate grounds. A decision has yet to be rendered in this pending habeas corpus action. Thus, peti-

tioner was not seeking release "pending review" of a decision by this district court either granting or denying habeas corpus relief. The only orders in existence at this point are outstanding state court judgments by which Mr. McCormick stands adjudged guilty as charged and convicted. He sought an order releasing him on bail before his case was in a posture obliging respondents to address the merits and before establishing he is properly in federal court. His motion for release on bail and his superfluous motion for expedited treatment were and remain without sufficient basis. It would be inappropriate for this court to enlarge petitioner on bail at this juncture based upon the self-serving arguments and allegations in his motion. *See Benson v. State of Cal.*, 328 F.2d 159, 162 (9th Cir.1964). The court tried to devote no more time than these requests warranted by issuing an immediate denial with little discussion^{FN3}. However, petitioner insists on engaging much more of the court's limited time apparently to obtain detailed reasons for the court's discretionary decision.

FN3. Like petitioner, the court is frustrated at all the unnecessary time and effort this matter is taking. However, the fault for the complications and delays lies directly and solely with Mr. McCormick, and his insistence on proceeding in ways that are not only unconventional but are also likely to be unsuccessful.

*2 Petitioner is neither a pre-trial detainee nor a successful habeas petitioner pending appeal. He has cited no constitutional provision or federal statute that entitles him to release on bail at this stage in these particular proceedings. He cites one case recognizing that a federal district court has inherent power to enlarge a state prisoner on bond, pending hearing and decision on a petition for habeas corpus. *Pfaff v. Wells*, 648 F.2d 689 (10th Cir.1981); *see also U.S. v. Palermo*, 191 Fed.Appx. 812, 813 (10th Cir.2006). His fervor suggests he is oblivious to the fact that the granting of such bail is so exceptional and rare that it is not often requested and sel-

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dom the subject of published case law.

A convicted prisoner who has had a full criminal trial and direct appeal is justifiably regarded in a very different posture than if there had been no prior judicial determination of his rights. As Mr. Justice Douglas long ago reasoned in denying a habeas petitioner's application for bail in *Aronson v. May*, 85 S.Ct. 3, 5 (1964):

This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. *Cf. Yanish v. Barber*, 73 S.Ct. 1105, 97 L.Ed. 1637 (1953). "There are thousands of prisoners confined in state prisons, any of whom, with a little assistance from their cell mates, would have no difficulty in drafting a petition for writ of habeas corpus which would allege substantial violations of constitutional rights. We do not propose, by ruling in this case, to open the door to the release of those thousands of prisoners on the basis of mere allegations in their petitions. (Citing *Benson*, 328 F.2d at 163 FN2).

Id. Another district court, after quoting Justice Douglas in *Aronson*, stated clearly as follows:

Before, and during, (a criminal) trial, the accused enjoys a presumption of innocence, and bail is normally granted. The presumption fades upon conviction, and can be of no significance after the defendant's appeal has been rejected. Correspondingly, the state acquires a substantial interest in executing its judgment. Quite apart from principles of comity, this combination of factors dictates a formidable barrier for those who seek interim release while they pursue their collateral remedies. (Cites omitted). We would express it in these terms. Both in the district court, and on appeal, in the absence of exceptional circum-

stances-whatever that may include-the court will not grant bail prior to the ultimate final decision unless petitioner presents not merely a clear case on the law, but a clear, and readily evident, case on the facts.

*3 *Edwards v. State of Okl.*, 412 F.Supp. 556, 560 (D.Ok.1976), cited by *Pfaff*, 648 F.2d at 693.

In this case, the court considered the facts, arguments and circumstances alleged in petitioner's motion and memorandum and did not find them to warrant his release on bail. The correct standard was applied that following a showing of exceptional circumstances and a demonstration of a clear case on the merits, a court may, in its discretion, grant the motion. *Johnson v. Nelson*, 877 F.Supp. 569 (D.Kan.1995); see *Mapp v. Reno*, 241 F.3d 221, 226 (2nd Cir.2001), and cases cited therein (The court's power to grant bail to habeas petitioners is a limited one, to be exercised only in special cases upon a showing of exceptional circumstances); see e.g. *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir.1990) (For a prisoner to receive bail pending a decision on the merits in a federal habeas action, the prisoner "must be able to show not only a substantial claim of law based on the facts, but also the existence of "some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice." "There will be few occasions where this standard will be met." *Id.*; see *Bolante v. Keisler*, 506 F.3d 618, 619 (7th Cir.2007) (the inherent power of federal court judges in habeas corpus proceedings to admit applicants to bail pending decision of their cases, is to be exercised very sparingly.); *Johnston v. Marsh*, 227 F.2d 528, 531 (3rd Cir.1955).

As discussed earlier, the reason the power is "to be exercised very sparingly" is that a habeas corpus petitioner, unlike a pretrial detainee, has already been convicted of a crime rather than having been merely charged. Mr. McCormick has been tried, convicted and sentenced by a court of law. His criminal proceedings were affirmed by the Kansas

appellate courts on direct appeal. As this court reasoned in its Order under challenge, petitioner's allegations and claims are not so plainly meritorious that this court is convinced there is a high probability of success on the merits. Petitioner does not allege any additional facts in his motion to alter judgment demonstrating a clear case on the merits or sufficient exceptional circumstances as would entitle him to release on bail. The court concludes no grounds are alleged or exist for this court to alter or amend its judgment entered March 12, 2008. Accordingly, petitioner's motion (Doc. 24) is denied.

MOTION TO DISMISS AS "MIXED PETITION"

Respondent moves to dismiss this action for failure to exhaust available state court remedies. Petitioner initially attempted to bring his habeas corpus claims in a civil rights complaint that also presented an unrelated conditions-of-confinement claim. See *McCormick v. Morrison*, 2008 WL 360586 (D.Kan. February 8, 2008). This court held that habeas corpus relief is not available in a civil rights action, and this separate action under § 2254 was filed. As noted in a prior Order, this court always and properly screens a habeas corpus petition for exhaustion of state court remedies ^{FN4}. Mr. McCormick's petition was screened, and the court found he had not shown full exhaustion of state court remedies on all his claims. Like every other litigant whose petition is facially deficient in this respect, he was ordered to show exhaustion ^{FN5}.

FN4. It has long been established that "before a petitioner may proceed in federal court under 28 U.S.C. § 2254, he or she must first exhaust viable state remedies." *Harris v. Champion*, 938 F.2d 1062, 1064 (10th Cir.1991); see *Picard v. Connor*, 404 U.S. 270, 275 (1971)(A state prisoner is generally required to exhaust available state court remedies before filing a habeas corpus action in federal court.); *Hernandez v. Starbuck*, 69 F.3d 1089, 1092-93 (10th Cir.1995), cert. denied, 517

U.S. 1223 (1996). 28 U.S.C. § 2254(b) expressly provides:

(1)An application for a writ of habeas corpus ... shall not be granted unless it appears that-(A) the applicant has exhausted the remedies available in the courts of the State, or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Id.

FN5. In McCormick's civil action, this court found:

Petitioner seeks to challenge his convictions upon trial by jury in the District Court of Douglas County, Kansas, of aggravated kidnaping, aggravated burglary, and aggravated intimidation of a witness. He represented himself at trial, with standby counsel, and was sentenced on April 15, 2004, to a controlling term of 213 months in prison. He appealed his convictions to the Kansas Court of Appeals (KCOA), with the assistance of appointed appellate counsel, and the KCOA affirmed on May 25, 2007 (footnote omitted). A Petition for Review was denied by the Kansas Supreme Court on September 27, 2007. On November 28, 2007, petitioner filed a 101-page "petition for writ of habeas corpus, pursuant to Ks.Sup.Ct. Rule 9.01..." directly in the Kansas Supreme Court claiming his appellate counsel was constitutionally ineffective for failing to properly raise several issues on his direct appeal. The Kansas Supreme Court summarily denied his petition on December 18, 2007. The instant federal Petition was filed on December 31, 2007.

McCormick, 2008 WL 360586 at *2. In the KCOA's published opinion, that court set forth the issues raised by petitioner:

The defendant challenges the district court's refusal to appoint substitute counsel; the admission of evidence seized in violation of the Fourth Amendment; the admission of prejudicial photographs; the denial of the defendant's request for a psychological evaluation of the victim; and the court's jury instructions on aggravated kidnapping and aggravated burglary. The defendant further contends the prosecution prejudiced his ability to obtain a fair trial by withholding exculpatory evidence and committing multiple instances of misconduct."

State v. McCormick, 37 Kan.App.2d 828, 830-31, 159 P.3d 194 (Kan.App.2007).

*4 In its order explaining that petitioner could not obtain habeas relief in his civil rights action, this court cited Section 2254(b)(1) and discussed petitioner's failure to show exhaustion on his habeas claims as follows:

"A state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Generally, the exhaustion prerequisite is not satisfied unless all claims asserted have been presented by "invoking one complete round of the State's established appellate review process." *Id.* at 845. In this district, that means the claims must have been "properly presented" as federal constitutional issues "to the highest state court, either by direct review of the conviction or in a post-conviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir.1994). Petitioner's claim that his appellate counsel was ineffective, among others, does not appear to have been properly presented through

one complete round of the state's appellate review process. The court is not convinced that his filing of an original action directly in the Kansas Supreme Court amounted to full exhaustion on those claims not presented in his direct appeal. Instead, petitioner must follow proper procedures by presenting all claims not raised on direct appeal in a post-conviction motion filed first in the state district court in which he was tried. If relief is denied by that court he must appeal to the Kansas Court of Appeals, and if that court denies relief petitioner must file a Petition for Review in the Kansas Supreme Court.

Mr. McCormick's claims are not exhausted unless and until he has presented each of them, including all crucial facts and legal theories in support, to the state district court, the Kansas Court of Appeals, and the Kansas Supreme Court. His belief that he could obtain no relief from the district court in a motion under K.S.A. § 60-1507, and his filing of an extraordinary action directly in the Supreme Court are simply not sufficient to show or excuse full exhaustion.

McCormick, 2008 WL 360586 at *1-*2. Thus, before the instant Petition was even submitted, Mr. McCormick was plainly informed that the federal habeas corpus statute and controlling case law required that he first fully exhaust state court remedies. *See Heck v. Humphrey*, 512 U.S. 477, 480-81 (1994), citing *Rose v. Lundy*, 455 U.S. 509 (1982). In the court's Order in McCormick's civil case, he was also informed:

An alternative for Mr. McCormick is to amend his Petition to state only those claims which were fully exhausted on direct appeal. However, if he attempts to raise any of the voluntarily dismissed claims in a subsequent federal petition, it will likely be barred as second and successive.

McCormick, 2008 WL 360586 at *2 FN2. Petitioner was also fully informed regarding the statute of limitations applicable to federal habeas corpus petitions, 28 U.S.C. § 2244(d)^{FN6}.

FN6. As petitioner was informed, this § 2254 petition, if dismissed without prejudice for failure to exhaust, will not have tolled the limitations period. On the other hand, the statute of limitations is tolled whenever “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim” is properly pending. 28 U.S.C. § 2244(d)(2). When petitioner was first ordered to show exhaustion, it did not appear that dismissal of this mixed Petition without prejudice would jeopardize the timeliness of a future federal petition raising all petitioner’s claims. Instead, its timeliness depended upon Mr. McCormick exercising diligence by properly filing and fully appealing, if necessary, a timely, tolling-type state action; and then by filing another federal Petition before the federal limitations period fully expired in his case. Petitioner has been repeatedly informed of the relevant statutory provisions and the limitations period to aid him in securing federal review of all his potential habeas claims.

*5 As the Supreme Court explained in *Rose v. Lundy*:

Under our federal system, the federal and state “courts [are] equally bound to guard and protect rights secured by the Constitution.” *Ex parte Royall*, 117 U.S., at 251, 6 S.Ct., at 740. Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” federal courts apply the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” (Cites omitted.).

Id. at 518. The Supreme Court found “equally as important” that federal claims which have been “fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.” *Id.*

The court in *Rose* noted that its rule encouraging exhaustion of all federal claims was particularly necessary in a case where “there is such a mixture” of claimed violations that “one cannot be separated from and considered independently of the others.” The Court stated:

Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

Rose, 455 U.S. at 519. To the extent exhausted and unexhausted claims are interrelated, the district court may dismiss mixed habeas petitions for exhaustion of all such claims. *Id.* As the Supreme Court further reasoned:

Rather than an “adventure in unnecessary lawmaking” (STEVENS, J., post, at 1214), our holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today’s holdings will “complicate and delay” the resolution of habeas petitions (STEVENS, J., post, at 1220), or will serve to “trap the unwary pro se prisoner.” (BLACKMUN, J., post, at 1209.) On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.

* * *

[S]trict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the

federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

*6 *Rose*, 455 U.S. at 519-20.

Respondent argues in his Motion to Dismiss that only the following three issues have been properly presented to the "highest state court," as required by controlling case law ^{FN7}: (1) State's trial evidence was seized in violation of the Fourth Amendment and should have been suppressed; (2) petitioner was denied his Sixth Amendment right to counsel; (3) petitioner was denied due process and a fair trial by "pervasive government misconduct" during the criminal proceedings ^{FN8}. In support, respondent provides the state appellate briefs. Mr. McCormick bears the burden of demonstrating that he has exhausted his available state remedies on all his claims. See *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir.1994), cert. denied, 513 U.S. 909 (1994); *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir.1992), cert. denied, 506 U.S. 924 (1992). The court finds petitioner does not present facts or exhibits which refute respondent's argument ^{FN9}. As the court already held, petitioner has not proven his attempt to by-pass normal procedures and present his claims directly to the Kansas Supreme Court amounted to exhaustion ^{FN10}.

FN7. *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir.1994).

FN8. In "Appellant's Petition for Review" filed in the Kansas Supreme Court on June 25, 2007, (Case No. 04-92408) McCormick sought review of the KCOA opinion affirming his convictions in the kidnapping case. The issues presented therein were: (1) "It was error for the court to permit Mr. McCormick to proceed pro se when he did not want to" and he was

denied the right to trial counsel; (II) the trial court erred in denying suppression of evidence seized from defendant's computer and residence pursuant to an overly broad search warrant, and the KCOA's finding that its admission was harmless was erroneous; and (III) improper comments by the State denied defendant the right to a fair trial. These claims are the only ones that have been fully and properly exhausted.

FN9. Petitioner's objections, arguments and motions made during proceedings at the trial level do not, as he suggests, amount to full exhaustion of the claims addressed therein. As noted, any such claims must have also been presented on direct appeal, or to both appellate courts through appeal of a proper postconviction motion. The latter process must be initiated in the trial court.

Nor does petitioner's pro se "Supplemental Petition for Review", which the docket sheet in Case 92408 indicates the court denied permission to file, establish full exhaustion of the claims raised therein.

The court also holds petitioner did not properly exhaust his unexhausted claims by seeking habeas relief under Kansas Supreme Court Rule 9.01. It is most likely that the highest state court dismissed, rather than addressed, petitioner's claims in his "Rule 9.01 Petition" because relief was available by motion in the state district court. Petitioner's contrary arguments are rejected. Petitioner's opinion, standing alone, that his "Rule 9.01 Petition" was a fair presentation of his claims to the Kansas Supreme Court does not establish that it satisfied the exhaustion prerequisite. Petitioner himself opined that the Kansas Supreme Court's denial of his original action is

tion that he remained in prison shows insufficient prejudice, given his incarceration is pursuant to a lawful sentence and retrial was not ordered. *Harris v. Champion*, 15 F.3d 1538, 1565 (10th Cir.1994).

The court concludes that the only claims on which petitioner has fully exhausted his state court remedies are the three presented to the Kansas Supreme Court in Appellant's Petition for Review, as argued by respondent in his motion to dismiss. The court further concludes that all other claims raised by petitioner have not been exhausted ^{FN13} and must be dismissed without prejudice.

FN13. Petitioner claims ineffective assistance of both trial and appellate counsel. He must have presented the grounds for both these claims to the state courts. With regard to defense counsel, he alleges he was denied a requested change of counsel and competent trial defense counsel. This claim was sufficiently exhausted. With regard to his appellate counsel, he claims she was constitutionally ineffective for failing to raise and argue several issues on direct appeal. This claim has not been properly exhausted.

In an unpublished opinion, the Tenth Circuit Court of Appeals opined that *Rose* in part "was superseded by statute ... upon the passage of (AEDPA), codified in relevant part at 28 U.S.C. § 2254(b)(2)," which states that "[a]n application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." *Rudolph v. Galetka*, 208 F.3d 227, * *1 (10th Cir., Mar. 21, 2000, Table)^{FN14}. The Tenth Circuit further stated, "This section allows federal district courts entertaining habeas petitions which contain unexhausted claims to address those claims if they can be decided on their merits against the petitioner." "This court recognizes it has discretion to hear and deny petitioner's unexhausted claims."^{FN15} However, it is not prepared to rule at

this juncture that petitioner's unexhausted claims fail to present even a colorable federal claim. See *Hoxsie v. Kerby*, 108 F.3d 1239, 1242-43 (10th Cir.), cert. denied, 522 U.S. 844 (1997). Petitioner's unexhausted claims are too numerous, often involve complicated arguments, and the voluminous full record has not been provided or reviewed. The court therefore declines to exercise its discretion to consider and deny any of petitioner's unexhausted claims on the merits.

FN14. This unpublished opinion is not cited for its precedential value.

FN15. *Rose* was decided in 1982, fourteen years before the AEDPA placed a one-year time limit on filing a federal habeas corpus petition in federal court. However, the AEDPA amendments to Section 2254 have certainly not abrogated the policy considerations found by the Supreme Court to underlie the exhaustion prerequisite. Moreover, this prerequisite is stated even more forcefully in the amended version of Section 2254.

In *Rose*, the Court "imposed a requirement of 'total exhaustion' and directed federal courts to effectuate this requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance." *Rhines v. Weber*, 544 U.S. 269 (2005), quoting *Rose*, 455 U.S. at 522. When the Court decided *Rose*, however, "there was no statute of limitations on the filing of federal habeas corpus petitions." *Id.* Consequently, "petitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitions with relative ease." *Id.* The AEDPA "dramatically altered the landscape for federal habeas corpus petitions." *Id.* In

particular, it “preserved [Rose]’s total exhaustion requirement,” but “also imposed a 1-year statute of limitations on the filing of federal petitions.”*Id.* “Although the limitations period is tolled during the pendency of a properly filed application for State post-conviction or other collateral review, the filing of a (federal) petition for habeas corpus does not toll the statute of limitations.”*Id.* (citations and internal quotation marks omitted). *Duncan v. Walker*, 531 U.S. 991 (2001). As a result, “petitioners who come to federal court with “mixed” petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims.”*Id.*

OPTIONS TO WITHDRAW OR FILE SECOND AMENDED PETITION

*7 Prior to the passage of AEDPA and the amended 28 U.S.C. § 2254, the United States Supreme Court held:

[A] district court must dismiss such “mixed petitions,” leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Rose, 455 U.S. at 510. After AEDPA became applicable, the United States Supreme Court continued to state, “Under *Rose*, federal district courts must dismiss mixed petitions.” *Pliler v. Ford*, 542 U.S. 230 (2004) citing *Rose*, 455 U.S. at 522. The Supreme Court in *Burton*, 549 U.S. 147, 127 S.Ct. at 797-98 explained:

The plurality opinion in *Rose v. Lundy*, stated that district courts should dismiss “mixed petitions”—those with exhausted and unexhausted claims—and that petitioners with such petitions have two options. They may withdraw a mixed petition, exhaust the remaining claims, and return

to district court with a fully exhausted petition. We have held that in such circumstances the later filed petition would not be “second or successive.”

Alternatively, prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles. (Cites omitted).

Id. The Court further warned:

The combined effect of *Rose* and AEDPA’s limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all his claims—including those already exhausted....

Pliler, 542 U.S. at 230.

Thus, petitioner has two main options in this action: (1) this Petition may be dismissed without prejudice for him to return to state court and exhaust his unexhausted claims, and after exhaustion is complete he may submit a new federal petition raising all his claims; or (2) all unexhausted claims must be dismissed and petitioner may proceed further in this federal action only upon those claims this court has found to be exhausted ^{FN16}. If he chooses to continue to proceed herein on his exhausted claims, whether or not it is “with objection,” any future habeas corpus petition he attempts to submit regarding these convictions or sentences will likely be barred as second or successive. *See* 28 U.S.C. § 2244(b)(2).

FN16. The facts before the court do not indicate stay and abeyance would be appropriate at this time. *Cf. Rhines*, 544 U.S. at 269. As the Supreme Court explained, stay and abeyance should “be available only in limited circumstances.”*Id.* The Court also directed that “stay and abeyance is only appropriate when the district court determines there was good cause for the petition-

er's failure to exhaust his claims first in state court." *Id.* There is no indication of good cause for petitioner's failure to exhaust his state court remedies.

Petitioner will be given time to submit for filing herein a "Second Amended Petition" setting forth only the three claims the court has found to be exhausted. If he does not file a Second Amended Petition in the time allotted by the court, his mixed petition shall be dismissed without prejudice on account of his failure or refusal to proceed only upon his exhausted claims.

For sake of clarity, the Second Amended Petition to be filed by Mr. McCormick must conform to the following directives, or it will be dismissed without prejudice as a mixed petition. The directives are:

*8 1. The Second Amended Petition must be submitted on the forms provided by the court in compliance with local court rules. Petitioner must answer all applicable questions in the forms, and may not submit additional sheets except to complete an answer begun on the form Petition.

2. Petitioner is to raise only the three issues found by this court herein to be exhausted. He is to present the factual and legal bases for his exhausted claims only as well as answers to other applicable questions on the forms.

3. Petitioner is not to argue or present material on any unexhausted issue in his Second Amended Petition.

4. Petitioner is not to include in his Second Amended Petition any argument regarding prior rulings of this court herein.

5. No petitions, memoranda, or motions previously filed by Mr. McCormick in this, his pending civil case, or state court are to be incorporated into his Second Amended Petition only by reference to the prior pleading with no indication as to content. If Mr. McCormick refers in his Second Amended Petition to any prior pleading or motion filed by him

without at least a summary of the content, the referenced material will not be considered. Petitioner may cut and paste content copied from his prior pleadings, quote or summarize.

6. Petitioner may refer to his exhibits submitted herein to support content in his Second Amended Petition, as long as he adequately describes the pleading to which the particular exhibit is attached, the exhibit itself, and the purpose for its citation.

Petitioner is also directed not to submit repetitive motions regarding recusal, reconsideration, expedited treatment, or release on bail in this action. If he does submit any such arguments or motions, they may be disregarded by the court or summarily denied.

To expedite these proceedings, no other motion will be addressed herein until petitioner has filed either a Second Amended Petition that complies with this Memorandum or a motion to withdraw or voluntarily dismiss this action without prejudice so that he might pursue exhaustion ^{FN17}. The court will rule on defendant's motion to dismiss once petitioner selects his option, or the time for petitioner to select has passed. If petitioner fails, within the time allotted, to file a Second Amended Petition as directed or a motion to withdraw or dismiss, defendant's motion will be sustained and the pending Petition will be dismissed, without prejudice, as a mixed petition.

FN17. If petitioner chooses to exhaust, the court again encourages him to at once properly file a post-conviction action in state court. His unexhausted claims could become defaulted if he allows the applicable state limitations period to pass without properly initiating a state court action.

The court has considered petitioner's latest Motion to Expedite Proceedings (Doc. 29) and finds it should be denied.

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IT IS THEREFORE ORDERED that petitioner's Motion to Alter or Amend Judgment (Doc. 24) and petitioner's Motion to Expedite Proceedings (Doc. 29) are denied.

IT IS FURTHER ORDERED that petitioner is granted twenty (20) days in which to either voluntarily dismiss or withdraw this "mixed petition" to exhaust state court remedies on all his claims, or in the alternative, to file a Second Amended Petition, which presents only those issues this court has held to be exhausted and which complies with all the directives set forth herein.

*9 The Clerk is directed to transmit forms for filing a habeas corpus petition pursuant to 28 U.S.C. § 2254 to petitioner.

IT IS SO ORDERED.

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Westlaw.

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(Not Selected for publication in the Federal Reporter)

(Cite as: 1 Fed.Appx. 856, 2001 WL 20789 (C.A.10 (Kan.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Alfred G. JONES, Petitioner-Appellant,
v.

Robert HANNIGAN; Attorney General of Kansas;
Kansas Parole Board, Respondents-Appellees.
No. 00-3099.

Jan. 9, 2001.

Prisoner whose request for parole had denied petitioned for writ of habeas corpus. The United States District Court for the District of Kansas denied petition. Prisoner appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) application of statute in effect at time prisoner previously violated his parole did not violate ex post facto clause; (2) Kansas parole statute did not create liberty interest protected by due process clause; and (3) summary affirmance by Kansas Supreme Court of dismissal of state habeas petition did not violate prisoner's due process rights.

Request for certificate of appealability denied, and appeal dismissed.

West Headnotes

[1] Habeas Corpus 197 ⚔ 342

197 Habeas Corpus

197I In General

197I(D) Federal Court Review of Petitions by State Prisoners

197I(D)2 Particular Errors and Proceed-

ings

197k332 Criminal Prosecutions

197k342 k. Sentence and Punishment. Most Cited Cases

Habeas corpus challenges to parole procedures concern the execution of a petitioner's state sentence, and therefore must be brought under statute establishing general power of courts to grant writ, rather than under statute permitting a federal remedy for challenges to legality of state custody. 28 U.S.C.A. §§ 2241, 2254.

[2] Habeas Corpus 197 ⚔ 666

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)1 In General

197k665 Petition or Application

197k666 k. Characterization; Treatment as Habeas Corpus Petition. Most Cited Cases
Petition for writ of habeas corpus in which state prisoner challenged parole procedures, which had been improperly brought pursuant to statute permitting a federal remedy for challenges to legality of state custody, would be treated as having been brought under statute establishing general power of courts to grant writ. 28 U.S.C.A. §§ 2241, 2254.

[3] Constitutional Law 92 ⚔ 2823

92 Constitutional Law

92XXIII Ex Post Facto Prohibitions

92XXIII(B) Particular Issues and Applications

92k2823 k. Parole. Most Cited Cases
(Formerly 92k203)

Pardon and Parole 284 ⚔ 42.1

284 Pardon and Parole

284II Parole

284k42 Constitutional and Statutory Provisions

284k42.1 k. In General. Most Cited Cases

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Application during parole hearing of Kansas statute in effect at time defendant had previously violated his parole, which precluded him from receiving credit for time served, rather than prior version of statute which would have allowed grant of such credit, did not implicate ex post facto clause. U.S.C.A. Const. Art. I, § 10, cl. 1; K.S.A. 22-3717(f).

[4] Constitutional Law 92 ⚔ 4838

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues and Applications

92k4838 k. Parole. Most Cited Cases

(Formerly 92k272.5)

Unless there is a liberty interest in parole, the procedures followed in making the parole determination are not required under due process clause to comport with standards of fundamental fairness. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚔ 4838

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues and Applications

92k4838 k. Parole. Most Cited Cases

(Formerly 92k272.5)

Pardon and Parole 284 ⚔ 46

284 Pardon and Parole

284II Parole

284k45 Authority or Duty to Grant Parole or Parole Consideration

284k46 k. Parole as Right or Privilege.

Most Cited Cases

Kansas parole statute does not give rise to a liberty interest protected by due process clause when the matter before Parole Board is the granting or denial of parole to one in custody. U.S.C.A. Const.Amend.

14.

[6] Pardon and Parole 284 ⚔ 46

284 Pardon and Parole

284II Parole

284k45 Authority or Duty to Grant Parole or Parole Consideration

284k46 k. Parole as Right or Privilege.

Most Cited Cases

Under Kansas law, parole, like probation, is a matter of grace, and is granted as a privilege and not as a matter of fundamental right.

[7] Constitutional Law 92 ⚔ 4489

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4489 k. Habeas Corpus. Most Cited Cases

(Formerly 92k306(6))

Habeas Corpus 197 ⚔ 849

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(D) Review

197III(D)2 Scope and Standards of Review

197k849 k. Subsequent Appeals; Review of Intermediate Court. Most Cited Cases
Petitioner's due process rights were not violated when Kansas Supreme Court summarily denied his appeal from affirmance by Kansas Court of Appeals of his state habeas corpus petition; applicable Kansas rule did not entitle petitioner to more than summary resolution of matter. Kan.Sup.Ct.Rules, Rule 8.03(e)(1).

***857** Before SEYMOUR, EBEL and BRISCOE, Circuit Judges.

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ORDER AND JUDGMENT^{FN*}

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

BRISCOE, Circuit Judge.

****I** After examining the briefs and appellate record, this panel has determined unanimously*858 that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a)(2); 10th Cir.R. 34.1(G). The case is therefore ordered submitted without oral argument.

Petitioner Alfred Jones, a state prisoner appearing pro se, seeks a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. After a review of Jones' claims, we conclude they are properly brought under 28 U.S.C. § 2241. We deny the request for a certificate of appealability and dismiss the appeal.

I.

Jones was convicted in 1967 of two counts of murder in the first degree, aggravated assault, aggravated robbery, unlawful possession of firearms, and willfully obstructing a ministerial officer in the discharge of an official duty, and was sentenced to life imprisonment. He was placed on parole on April 24, 1990. On April 23, 1993, his parole was revoked based on Jones committing new crimes and his violation of parole conditions. He was again placed on parole on May 13, 1993, but it was revoked on September 27, 1995, after he was convicted of burglary and theft and found in violation of parole conditions. Jones was denied parole on August 21, 1997, and was passed for parole consideration until September 2000, because of the

“serious nature & circumstances of crime; history of crim. acts; 3 times in prison; failure on parole.” Record, Doc. 7, att. 7. His request for reconsideration was denied. Jones' action for habeas relief in state court was dismissed for failure to state a claim. The Kansas Court of Appeals affirmed the district court's action and the Kansas Supreme Court denied review.

In his § 2254 habeas petition, Jones argued that (1) application of Kan.Stat. Ann. § 22-3717(f) (1993 Supp.), that was in effect at the time he violated parole in 1995, violated the ex post facto clause because he was denied the benefit of application of the earlier version of the statute; (2) he was denied due process because the reasons stated for parole denial in August 1997 related to why he was being passed for parole to 2000 and not why he was being denied parole; and (3) the Kansas Supreme Court violated his due process rights by denying review of the Kansas Court of Appeals decision.

II.

[1][2] Although Jones invoked § 2254 and the district court discussed the petition as arising under § 2254, challenges to parole procedures concern the execution of a petitioner's sentence and therefore must be brought under 28 U.S.C. § 2241. See *United States v. Furman*, 112 F.3d 435, 438 (10th Cir.1997). Accordingly, the petition will be treated as if it were filed under § 2241.

Jones contends that, notwithstanding its repeal, Kan.Stat. Ann. § 22-3717(f) (1993 Supp.) should have been applied during his parole hearing, entitling him to have his sentence “converted to a KGSA sentence and to receive credit for time served toward the converted sentence.” *State v. Perez*, 11 P.3d 52, 53 (Kan.2000). In an attempt to avoid the rule that “[c]riminal statutes and penalties in effect at the time of a criminal offense are controlling,” *State v. Sisk*, 266 Kan. 41, 966 P.2d 671, 674 (Kan.1998), Jones argues the legislature *859 violated the ex post facto clause when it altered §

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22-3717(f) in 1994.

****2 [3]** “ ‘To fall within the ex post facto prohibition, a law must be retrospective-that is, it must apply to events occurring before its enactment-and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime.’ ” *Smith v. Scott*, 223 F.3d 1191, 1194 (10th Cir.2000) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)). Here, the law in effect when Jones violated his parole was applied to him. As a result, the ex post facto clause is not implicated.

[4][5][6] Jones next contends he was denied due process because the reasons stated for denial of parole in August 1997 related to why he was being passed for parole to 2000 and not why he was being denied parole. Even assuming, arguendo, that the reasons given only concerned the reason he was passed for parole, “[u]nless there is a liberty interest in parole, the procedures followed in making the parole determination are not required to comport with standards of fundamental fairness.” *O’Kelley v. Snow*, 53 F.3d 319, 321 (11th Cir.1995). “[T]he Kansas parole statute does not give rise to a liberty interest when the matter before the Board is the granting or denial of parole to one in custody. Parole, like probation, is a matter of grace in this state. It is granted as a privilege and not as a matter of fundamental right.” *Gilmore v. Kansas Parole Board*, 243 Kan. 173, 756 P.2d 410, 415 (Kan.1988). As a result, Jones cannot show the violation of a constitutional right.

[7] Jones also contends the Kansas Supreme Court violated his due process rights by denying his appeal from the Kansas Court of Appeals. In effect, he argues he is entitled to a written decision explaining the court’s resolution of his appeal, citing Kansas Supreme Court Rule 8.03(e)(1). The Kansas Supreme Court did consider Jones’ appeal and denied it. The rule does not require more than a summary resolution.

Jones has not made “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and his request for a certificate of appealability is DENIED. The appeal is DISMISSED. The mandate shall issue forthwith.

C.A.10 (Kan.),2001.

Jones v. Hannigan

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